Court of Exchequer, Sittings in Banc after Hilary Term, February, 6th, 1856.

BLYTH *vs.* THE BIRMINGHAM WATERWORKS COMPANY.

1. A party who takes reasonable care to guard against accidents arising from ordinary causes is not liable for accidents arising from extraordinary ones; and therefore
2. Where a company incorporated for supplying a street with water constructed their apparatus according to the best known system, and kept it in proper repair for twenty-five years, at the end of which time a frost of unusual severity acted on the apparatus, so as to cause injury to the property of another person—Held, that the company were not liable for negligence.
3. Per ALDERSON, B.—Negligence consists in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing, unintentionally, mischief to a third party.

This was an appeal from the decision of the county court of Warwickshire, holden at Birmingham. The action was for negligence, and was tried before the judge of the county court and a jury. The plaintiff was in the occupation of a dwelling-house, with cellarage, in Woodcock-street, Birmingham. By the 7 Geo. 4, c. 109 the defendants were incorporated as a company for the purpose of supplying Birmingham and the parts adjacent with water. The statute directed that whenever the company should lay down any main or other pipe in any street, &c., they should fix and place proper and sufficient fire-plugs in it; also that all pipes and conduits should be laid eighteen inches at least from the surface of the soil; and that all the mains to be laid down and used should at all times be kept charged full of water. The defendants, acting under this statute, laid a main pipe for the purpose of conveying water along Woodcock-street, Birmingham, which main was placed more than eighteen inches deep, and at a reasonable distance from the plaintiff's premises, and upon the main they placed a fire-plug, constructed according to the best known system. The apparatus connected with this was as follows: The lower part of a wooden plug was inserted, and fitted tight in a neck projecting above and forming part of the main. All round this neck, and extending both above and below it, was a bed of brickwork, puddled round with clay.

The plug was also enclosed in a cast-iron tube placed upon and fixed to the brickwork, and on the top of which, level with the surface of the street, was a movable iron stopper, having a hole in the top of it for the insertion of the key by which the plug was loosened when necessity arose. The plug did not fit tight to the tube, but room was left for it to move freely when occasion required, and this space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon the main forced the water up through the neck and cap to the surface of the street. On the 24th February, 1855, a large quantity of water, escaping from the neck of the main pipe just opposite the plaintiff's house, forced its way through the ground into his cellar, doing considerable mischief, to recover damages for which he brought the present action. Immediately after the accident the defendants sent men to the spot to discover the cause of it, but in consequence of their not digging deep enough they were unsuccessful, and the cause was not discovered until several months after, when the defendants' men were digging up the earth round the plug in order to remove the brickwork. One of the severest frosts on record set in on the 15th January preceding, and continued up to the time of the accident. An incrustation of ice and snow had gathered about the stopper and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident, and a short time after it the turncock of the defendants removed the ice from the stopper, took out the plug, and replaced it. The engineer of the defendants, who was examined as a witness, said he thought the accident might have been caused by the frost in this way—the expansion of the ice from thaw forced the plug out of the neck of the main, when, the stopper being incrusted with ice, the plug could not ascend; and the water, being thus unable to force its way through the usual channel, penetrated through the brickwork round the neck of the main, and thence forced its way into the plaintiff's cellar. The apparatus of the defendants was laid down twenty-five years before the accident, and had always worked well. The main

had not been examined during that time, but three or four months before the accident the plug had been examined, and was found in good repair. On this state of facts the judge told the jury that the defendants must have known of the frost, and might have calculated its probable effects; and it was for them to say whether the defendants had exercised proper care to avert any ill consequences arising therefrom; if not, they were liable for negligence, in which case the jury should assess the amount of damages. The jury found for the plaintiff. This case was argued by

C. R. Kennedy, for the plaintiff; and

Field, for the defendants.

Aldridge vs. *The Great Western Railway Company* (3 Man. & G. 515; 4 Scott's N. R. 156.) and *Siordet* vs. *Hall* (4 Bing.607) were cited.

ALDERSON, B.—I have attended as well as I could to the argument in this case, and am clearly of opinion that the defendants are not liable. Negligence I define to be, either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing mischief to a third party; not *intentionally*, for then it would not be negligence. Now, what would a reasonable man have done in the present case? He would have gone according to the average state of the temperature, and its average consequences. It appears that a frost set in in January and continued to the end of February, and of course a quantity of ice lay on the ground. The defendants are compelled by their act of Parliament to keep a fit plug in the street communicating with the main of the waterworks below, so that in ordinary cases of frost no water could have reached the plaintiff's cellar. We know that frost only penetrates to a certain distance below the surface of the earth, and surely if you provide for the case of ordinary accidents, you are not liable for extraordinary ones like the present. Suppose you place your apparatus at such a depth as is sufficient to guard against the consequences of the frost that is usual in this country, it would be monstrous to say that you are liable because in the year 1855 God sends such a frost as penetrates to the same depth as the frost in Lapland or the polar

regions. No reasonable man would apprehend such a thing, or make provision for it. The curious part of the present case is, that on the night of the accident the defendants tried to discover how the water came into the plaintiff's cellar, but did not find it out until many months afterwards, when they dug down and found the cause of the accident in the preceding February; so that after the frost had gone the apparatus appears to have acted satisfactorily. The whole thing was an accident occasioned by frost, which was utterly unforeseen, and the cause of which was not discovered till long after, though the defendants looked for it. That cannot be called negligence.

MARTIN, B.—The judge of the county court did not decide rightly in this case. It is clear that by the law of England, in order to make the defendants responsible there must have been some negligence on their part, and it was for the judge to say whether there was any evidence of it. Here was a plug fixed in a pipe, and if found for twenty-five years to be good against the effects of frost, why should not the defendants have supposed it would serve the same purpose in future? And if so, how can a man be guilty of negligence in not making provision for what he could not foresee? Such a doctrine would make the company insurers against all consequences of accummulation of water in their pipes. The judge was, therefore, not correct in leaving this case to the jury. There was no evidence of negligence for them to consider, and if the plaintiff did not consent to be nonsuited, the judge should have told them, as matter of law, to find for the defendants.

BRAMWELL, B.—These defendants are bound by law to lay down these pipes, and have fit plugs for them, and they did properly all they were required to do. I doubt if the defendants were bound to remove the ice round the stopper of the plug, even if they apprehended the probable consequence of its remaining there; for the statute merely says they shall have a proper plug, and consequently, if the ice gets above that place, they have nothing to do with it; and I further doubt whether it might not be retaliated on the plaintiff, "Why did not you remove the ice yourself?" But however that may be, would it not be monstrous to hold a person liable for neg-

ligence because he did not foresee and prevent that which, as my Brother Alderson says, was so remote that the cause of it could not be found out for many months? I think, therefore, that the judge should have nonsuited the plaintiff; and if he refused to be nonsuited, to have told the jury there was no evidence of negligence for them to act on. Judgment for the defendants.

ABSTRACTS OF POINTS DETERMINED IN THE ENGLISH COURTS OF COMMON LAW.

GODTS *vs.* ROSE. 17 Com. B. 229.

Sale of Goods—Property and right of possession, how passed.

This was an action of trover, to recover a quantity of rape-oil.

The plaintiff having a quantity of rape-oil at Humphrey's wharf, contracted to sell five tons thereof to the defendant. The bought note was as follows:—"Bought for account of Mr. W. A. Rose, of Mr. H. A. Godts, five tons of first quality, foreign refined rape-oil, at 53*s.* per cwt., usual allowances; to be free delivered, and paid for in fourteen days, in cash, less 2½ per cent. discount."

The plaintiff sent an order to the wharf, directing the wharfinger to transfer into the defendant's name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave the plaintiff's clerk a transfer-order, addressed to the defendant, acknowledging to hold the five tons for him. The plaintiff's clerk took the invoice and transfer-order to the defendant's counting-house, and offered them to him, at the same time demanding a cheque for the amount. The defendant, without (as the jury found) the consent of the plaintiff's clerk, took the transfer-order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to the defendant. In defiance, however, of this notice, the oil was afterwards delivered.

The Court of Common Pleas held that, under the circumstances, neither the property, nor the right to the possession thereof, passed to the defendant.

"If it were necessary," says Mr. Justice Willes, "to pronounce an opinion upon the construction of the contract, I should have little hesita-